No. 10-16645

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STATE OF ARIZONA; JANICE K. BREWER,
Governor of the State of Arizona, in her official capacity,
Defendants-Appellants,

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:10-cv-01413-SRB
Honorable Judge Susan R. Bolton

BRIEF OF *AMICUS CURIAE* JUSTICE AND FREEDOM FUND IN SUPPORT OF THE APPELLANTS SEEKING TO REVERSE THE DISTRICT COURT OPINION

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CORPORATE DISCLOSURE STATEMENT

Appellate Court Number: 10-16645
Short Caption: USA v. State of Arizona, et al.

(1) The full name of every party that the attorney represents in the case:

Justice and Freedom Fund

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

This is an amicus brief, so no appearances are made. Counsel of record for amicus, Justice and Freedom Fund, is listed below (James L. Hirsen, Attorney at Law).

(3) If the party or amicus is a corporation:

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None

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None

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INTEREST OF AMICI

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the District Court should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. In this case, JFF is interested in upholding the Arizona law, in order to preserve the rights of all citizens and lawful aliens to employment. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case—much like the recent litigation upholding the Legal Arizona Workers Act, Ariz. Rev. Stat. § 23-211 et seq.—"Is brought against a blank factual

background of enforcement and outside the context of any particular case." *Chicanos Por La Causa, Inc. v. Napolitano (Chicanos Por La Causa II)*, 558 F.3d 856, 861, 861 (9th Cir. 2009) ("*Chicanos*"). A facial challenge cannot be sustained against a statute with a "plainly legitimate sweep." *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2007), quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-740 (1997) (Stevens, J., concurring in judgments); cited in *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202 (2008).

This amicus brief zeroes in on Section 5 of S.B. 1070 (A.R.S. § 13-2928(C)), which prohibits unlawful aliens from soliciting employment. That statute has a "plainly legitimate sweep," regulating *employment*—traditionally a matter of state police powers—not *immigration*. It neither duplicates nor conflicts with the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C.S. § 1324a et seq. On the contrary, it bolsters federal objectives by regulating the conduct of local workers who are subject to few penalties at the federal law.

ARGUMENT

I. EMPLOYMENT IS TRADITIONALLY A *STATE* MATTER.

This Court must tread carefully so as not to encroach on Arizona's historic police powers. Regulation and protection of workers falls within these broad state powers: "Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few

examples." *De Canas v. Bica*, 424 U.S. 351, 356 (1976). This principle undergirds the *Chicanos* decision, explaining that "the authority to regulate the employment of unauthorized workers is 'within the mainstream' of the state's police powers." *Chicanos, supra,* 558 F.3d at 861, 864, citing *De Canas v. Bica*, *supra*, 424 U.S. at 356, 365.

Well-established precedent holds that "congressional intent to supersede state laws must be 'clear and manifest'" in a field—like employment—traditionally regulated by the states. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 239 (1947); *see also United States v. Locke*, 529 U.S. 89, 108 (2000). An inference of preemption must be drawn only with "compelling congressional direction" when the regulated conduct "touch[es] interests...deeply rooted in local feeling and responsibility." *San Diego Unions v. Garmon*, 359 U.S. 236, 244 (1959). It is not enough to find preemption merely because a state law "impose[s] liability over and above that authorized by federal law." *English v. Gen. Elec. Co.*, *supra,* 496 U.S. at 89, quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989) (slip. op. 10). In *English*, nothing in the Energy Reorganization Act revealed that Congress intended to override a whistleblower employee's state law tort claims for her employer's outrageous conduct. *English v. Gen. Elec. Co.*, *supra*, 496 U.S. at 83. Here, as in *English* and

Chicanos, the nature of the subject matter is "[a]n issue central to [the] preemption analysis." *Chicanos*, *supra*, 558 F.3d at 864. The subject matter is employment—a preeminently state concern.

A. Arizona Regulates *Employment*—Not *Immigration*.

Federal power to formulate immigration policy is "firmly embedded in the legislative and judicial tissues of our body politic." *Galvan v. Press*, 347 U.S. 522, 531 (1954). *See* U.S. Const. art. I, sect. 8, cl. 4; *Smith v. Turner*, 48 U.S. 283 (1849) (striking down state statutes authorizing a tax on all passengers arriving in a state port by vessel from a foreign port); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (striking down state bond/tax on incoming immigrant passengers); *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (state could not require bond upon arrival of aliens unable to care for themselves). The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq.—"is a comprehensive legislative scheme intended to govern all aspects of the admission of aliens to the United States." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1358 (9th Cir. 1990), *rev'd*, 502 U.S. 183 (1991).

But these basic principles do not end the inquiry:

> [T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power.... [T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a

> determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.
>
> *De Canas v. Bica, supra*, 424 U.S. at 355

Arizona has not transgressed the immigration boundary. Like the Legal Arizona Workers Act, *nothing* in Section 5 "attempt[s] to define who is eligible or ineligible to work under our immigration laws." *Chicanos, supra*, 558 F.3d at 866. The law is premised on federal definitions and does not "*add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence* of aliens in the United States." *De Canas v. Bica, supra*, 424 U.S. at 358 n. 6 (emphasis in original). Nor does it "[touch] the rights, privileges, obligations or burdens of aliens as such." *Hines v. Davidowitz,* 312 U.S. 52, 62 (1941). Much like the California statute upheld in *DeCanas*, Arizona law "is not aimed at immigration control or regulation" but protects *lawful* workers—citizens and resident aliens alike. *De Canas v. Bica, supra*, 424 U.S. at 354 n. 3.

B. Arizona Law Imposes No Discriminatory Burdens On *Lawful* Aliens—It *Protects* Their Rights, Including Lawful *Employment*.

"Opposition to laws permitting invasion of the personal liberties of law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history...." *Hines v. Davidowitz, supra*, 312 U.S. at 70.

A lawfully admitted resident alien is a "person" entitled to Equal Protection. *In re Griffiths*, 413 U.S. 717, 719-720 (1973). No state may discriminate against *lawful* aliens by imposing "extraordinary burdens and obligations upon. . .them alone." *Hines v. Davidowitz, supra,* 312 U.S. at 65-66. A state may not impose residency requirements on lawful aliens as a condition for welfare benefits, because such a mandate would "necessarily operate...to discourage entry into or continued residency in the State." *Graham v. Richardson*, 403 U.S. 365, 379 (1971) (striking down state statutes that conditioned welfare benefits on U.S. citizenship or a specified length of residency). A state could limit assistance to citizens, but could not discriminate against naturalized citizens by mandating a minimum period of residence. *Id.* at 381.

A *lawfully* admitted alien has the right to live in any state and work in the common occupations of the community. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 415 (1948) (state could not bar an alien from earning his living as a commercial fisherman). Denial of employment opportunities to *lawful* aliens "would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." *Truax v. Raich*, 239 U.S. 33, 42 (1915) (striking down Arizona law requiring employers of more than five workers to hire not less than 80% native-born citizens). *See also In*

re Griffiths, supra, 413 U.S. 717 (striking down Connecticut State Bar rule that prohibited resident aliens from taking bar exam).

Arizona has not intruded upon federal immigration authority by imposing "discriminatory burdens upon the entrance or residence" of *lawful* aliens. *Takahashi v. Fish & Game Comm'n, supra,* 334 U.S. at 419. On the contrary, Section 5 serves protective purposes for *all* lawful state residents—unlike the Pennsylvania statutes in *Hines v. Davidowitz, supra,* 312 U.S. 52 and *Pennsylvania v. Nelson,* 350 U.S. 497 (1956) that burdened lawful aliens and conflicted with federal law. *De Canas v. Bica, supra,* 424 U.S. at 363. Arizona law is comparable to the California statute upheld in *DeCanas*, "designed to protect the opportunities of lawfully admitted aliens for obtaining and holding jobs, rather than to add to their burdens." *Id.* at 358 n.6. As the Supreme Court explained:

> Employment of illegal aliens in times of high unemployment deprives citizens *and legally admitted aliens* of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens *and legally admitted aliens....*
>
> *Id.* at 356-357 (emphasis added)

"These local problems [job shortages and substandard working conditions] are particularly acute in [Arizona] in light of the significant influx into that State of illegal aliens from neighboring Mexico." *Id.* at 357. Arizona has addressed those local problems to protect *all* of its *lawful* workers and strengthen its economy. In

this facial challenge, any impact on immigration would be "purely speculative and indirect"—not a "constitutionally proscribed regulation of immigration." *Id.* at 355-356.

Section 5 parallels the INS regulation the Supreme Court upheld in *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991). The disputed regulation only applied to aliens who lacked work authorization in the first place and was never intended to interfere with the *lawful* employment rights of aliens authorized to work. *Id.* at 189-190. Arizona law is similar—it only prohibits the solicitation of employment by persons who are in the country *illegally* and for whom employment would be *unlawful*.

C. The Inquiry Begins With A *Presumption* That Federal Law Does Not Preempt Arizona's Regulation Of Employment—A Preeminently State Matter.

Immigration is unquestionably a federal matter, but regulation of the employment relationship—to protect workers in the state and its economy—is traditionally a state prerogative. Although these two areas intersect when governments regulate the employment of alien workers, *employment* generally falls within the broad authority of the states. *De Canas v. Bica, supra*, 424 U.S. at 356. Section 5 regulates employment—not immigration—leaving federal law intact to define the persons who may lawfully seek work.

In upholding the Legal Arizona Workers Act, this Circuit agreed that "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies"—in spite of the *Hoffman* holding that IRCA had made the employment of unauthorized workers "central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc., supra,* 502 U.S. at 194) (alteration in original). *Chicanos, supra*, 558 F.3d at 861, 864-865. The District Court conceded this precedent. *United States v. Arizona*, No. CV 10-1413-PHX-SRB, 2010 U.S. Dist. LEXIS 75558, *49-50 (D. Ariz. July 28, 2010). Where Congress legislates in a field traditionally occupied by the states, courts must begin the preemption query with the presumption that state powers are not superseded in the absence of express congressional mandate. *Wyeth v. Levine,* 129 S. Ct. 1187, 1194-95 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992); *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 500 (1988); *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230. That presumption has long been applied to claims of implied conflict preemption. *Wyeth v. Levine, supra*, 129 S. Ct. at 1195 n. 3; *see, e.g., California v. ARC Am. Corp., supra,* 490 U.S. at 101-102; *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985).

The Supreme Court has refined the general principle by explaining that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons. . .either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. 132, 142 (1963). If the subject matter is "an area where there has been a history of significant federal presence," then "an assumption of nonpreemption is not triggered." *United States v. Locke*, *supra*, 529 U.S. at 208. *Locke* involved international maritime commerce—a traditionally *federal* domain—but there is no comparable federal presence in the sphere of employment—a matter of local concern traditionally reserved for *state* regulation.

D. Federal Law Does Not *Expressly* Preempt Arizona's Right To Regulate Its Workers.

Federal preemption may either be express or implied. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982). Express provisions require courts to "identify the domain expressly preempted." *Medtronic, Inc. v. Lohr*, *supra*, 518 U.S. at 484, quoting *Cipollone v. Liggett Group, Inc.*, *supra*, 505 U.S. at 517. The "task is an easy one" where "Congress define[s] explicitly the extent to which its enactments pre-empt state law." *English v. Gen. Elec. Co.*, *supra*, 496 U.S. at 79, 78.

This Circuit has already considered IRCA's express preemption clause concerning *employers* who hire unauthorized alien workers—"those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C.S. § 1324a(h)(2). *Chicanos, supra,* 558 F.3d at 867. That provision contained a "savings clause" allowing the sanctions Arizona enacted in the Legal Arizona Workers Act. "It preempts all state sanctions 'other than through licensing and similar laws.' 8 U.S.C. § 1324a(h)(2)." *Id*. at 861.

IRCA's language may be straightforward as to *employers*—but it is neither so comprehensive nor so explicit that it trumps all possible state regulation of *employees*. The Court will thus need to examine whether Congress has impliedly occupied the legislative field as to employees.

E. IRCA Does Not Occupy The Entire Field Of Employment.

The District Court concluded that "Congress has comprehensively regulated in the field of employment of unauthorized aliens"—leaving no room for state regulation. *United States v. Arizona, supra*, 2010 U.S. Dist. LEXIS 75558 at *45. The matter is not that simple.

Congress enacted comprehensive regulations for *employers* but only minimal sanctions for *employees*. The decision to limit employee penalties at the *federal* level does not automatically handcuff state officials and strip them of the right to regulate local workers—a task more suited to local law enforcement.

> It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.
>
> *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230-231

See also Townsend v. Yeomans, 301 U.S. 441, 454 (1937) ("[I]f it be assumed that Congress has that authority, it has not been exercised and in the absence of such exercise the State may impose the regulation in question for the protection of its people"); *Union Brokerage Co. v. Jensen*, 322 U. 202, 210 (1944) ("The incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests....").

Field preemption occurs where "the depth and breadth of a congressional scheme...occupies the legislative field." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, supra*, 458 U.S. at 153; *Chicanos, supra*, 558 F.3d at 861, 863; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (Federal Cigarette Labeling and Advertising Act preempted state law that regulated outdoor cigarette advertising in order to reduce tobacco consumption by minors). A legislative scheme may be so pervasive, or the federal interest so dominant, that preemptive intent is reasonably implied. *English v. Gen. Elec. Co., supra,* 496 U.S. at 79; *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, supra,* 458 U.S. at 153; *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230. Sometimes Congress deliberately assumes responsibility for an entire field of

legislative activity. In *Pennsylvania v. Nelson, supra,* 350 U.S. at 504, it was evident that "Congress ha[d] intended to occupy the field of sedition," precluding state supplementation.

But comprehensive federal regulation of an entire field is not "created subtly." *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., supra*, 485 U.S. at 500. Field preemption is an elusive doctrine:

> "Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. *Every Act of Congress occupies some field*, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history." *Hines v. Davidowitz,* 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting).
>
> *De Canas v. Bica, supra*, 424 U.S. at 360 n. 8 (emphasis added)

The existence of a "detailed statutory scheme"—"given the complexity of the matter"—might be reasonable even in the absence of preemptive intent. *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

The traditional preemption categories—express, field, and actual conflict—are "not rigidly distinct." *English v. Gen. Elec. Co., supra,* 496 U.S. at 79 n. 5. "[F]ield preemption may be understood as a species of conflict pre-emption" where Congress intentionally excludes all state regulation. *English v. Gen. Elec. Co., supra*, 496 U.S. at 79 n. 5. In that case, the very enactment of state law would conflict with congressional intent. But when "Congress, while regulating related

matters"—*employer* hiring of unlawful aliens—"le[aves] untouched a distinctive part of the subject which is peculiarly adapted to local regulation"—*employee* regulation—"the state may legislate concerning such local matters which Congress could have covered but did not." *Hines v. Davidowitz*, *supra*, 312 U.S. at 68 n. 22. That is exactly what happened in Arizona.

> There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced.
>
> *Kelly v. Washington*, 302 U.S. 1, 9-10 (1937) (Congress did not "occupy the field" so as to preclude state inspection of vessels for safety and seaworthiness)

F. IRCA Regulates *Employers* Extensively—But Leaves Room For States To Regulate *Employees*.

The District Court grounds its conclusion in certain statements plucked from *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, *supra*, 913 F.2d 1350:

> While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals.... Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work.
>
> *Id.* at 1368

It is reasonable to conclude that Congress has "occupied the field" as applied to *employers*, imposing an array of penalties on employers who "knowingly hire or continue to employ an alien without work authorization." 8 U.S.C. § 1324a(a)(1)-

(2), (e)(4). IRCA contains very limited sanctions targeting employees: 8 U.S.C. § 1324c (submitting false documents in the context of unlawful employment of an unauthorized alien); 8 U.S.C. § 1324a(b)(2) (attestation requirements as condition of employment). *United States v. Arizona*, *supra*, 2010 U.S. Dist. LEXIS 75558, at *52-*53.

Perhaps Congress elaborated a policy choice *at the federal level* "to reduce or deter employment of unauthorized workers by sanctioning employers, rather than employees." *Id.* at *52-*53, citing *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, *supra*, 913 F.2d at 1370. But as this Circuit made clear, the federal statutory scheme protects the jobs of lawful *employees* by reducing the incentive to hire unlawful workers—and the lure of U.S. employment that draws illegal aliens into the country. *Id.* at 1367. *At the federal level*, Congress strategically focused on employers to achieve these goals. The employee sanctions are primarily related to documentation required for employment—documents aliens would receive from the *federal* government. This streamlined federal legislation does not foreclose the possibility for states to regulate the conduct of individuals within their borders.

The INS regulation struck down in *Nat'l Ctr. for Immigrants' Rights* was ultimately upheld by the Supreme Court. *INS v. Nat'l Ctr. for Immigrants' Rights*, *supra*, 502 U.S. 183. The Immigration and Nationality Act, Section 242(a), permitted the Attorney General to impose conditions on the release bonds of

excludable aliens who had been arrested and awaited a determination of deportability. The disputed condition prohibited *unauthorized* employment pending that determination. *INS v. Nat'l Ctr. for Immigrants' Rights*, *supra*, 502 U.S. at 184-185. Since lawful employment was not impacted, the condition was hardly controversial:

> The objective of this Act was to stop illegal aliens from working, period.... *In no way do the existence of employer sanctions suggest or imply that unauthorized work by illegal aliens is somehow acceptable*. The choice of sanctions does not alter the primary thrust of the legislative scheme which is to deter and to prevent unauthorized employment.
>
> *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, *supra*, 913 F.2d at 1375 (Trotter, J., dissenting) (emphasis added)

Although *INS* did not involve a state statute, the rationale is similar for Arizona—which is far better situated to monitor the activities of its local illegal residents who solicit *unlawful* employment. Federal law prohibits one side of the coin—unlawful *hiring*. State law prohibits the corresponding side—unlawful *solicitation* of work that would be illegal under federal law.

II. THE ARIZONA LAW POSES NO THREAT TO FEDERAL LAW ENFORCEMENT OR OBJECTIVES.

Arizona law provides that "it is *unlawful* for a person who is *unlawfully* present in the United States and who is an *unauthorized* alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." Ariz. Rev. Stat. § 13-2928(C) (Section 5 of

S.B. 1070) (emphasis added). The obvious purpose—to prevent employment that is illegal under federal law—is entirely consistent with federal objectives. There is no conflict whatsoever—in theory, definition, purposes, or implementation.

A. Arizona Law Does Not Conflict With Congressional Intent Or Frustrate The Accomplishment Of Federal Immigration Law Purposes.

A "primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). The Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 et seq. ("INA") "'provide[s] for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.' H.R. Rep. 1365, 82d Cong. 2d Sess. 51 (1957)." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS, supra*, 913 F.2d at 1374 (Trotter, J., dissenting). IRCA strengthened and reinforced that purpose, "reiterat[ing] the desire of Congress to erect at the borders barriers designed to protect U.S. citizens, and others here with lawful permission to work, from competition by illegal aliens not authorized by law to work in this country. *The objective of this Act was to stop illegal aliens from working, period*." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS, supra*, 913 F.2d at 1374-75 (Trotter, J., dissenting) (emphasis added).

Section 5 preserves jobs for all *lawful* Arizona workers—citizens and *lawful* aliens alike—protecting both from illegal competition. In *Meditronic*, the Supreme Court concluded that overriding the state statute at issue would have "the perverse effect of granting complete immunity. . .to an entire industry that, in the judgment of Congress, needed more stringent regulation." *Medtronic, Inc. v. Lohr, supra,* 518 U.S. at 487. It would be equally perverse to squelch Arizona's law enforcement efforts by granting a free pass to *unlawful* aliens who solicit *illegal* employment. "It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.' *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)." *Medtronic, Inc. v. Lohr, supra,* 518 U.S. at 487.

One species of "conflict preemption occurs. . .where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Lorillard Tobacco Co. v. Reilly, supra,* 533 U.S. 525, quoting *Hines v. Davidowitz, supra,* 312 U.S. at 67; cited in *Chicanos, supra,* 558 F.3d at 863. Federal law preempted a state provision for "no airbag" lawsuits because it conflicted with congressional objectives—the gradual development of alternative passive restraint devices for safety-related reasons. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000). Similarly, a state could not enforce its laws regulating oil tanker design and related requirements, because enforcement would

frustrate Congress' intent to establish a uniform federal regime controlling oil tanker design. *United States v. Locke, supra,* 529 U.S. at 109.

Laws consistent with congressional purpose are not so easily stricken. The Supreme Court upheld a disputed INS regulation as "wholly consistent with [the] established concern of immigration law"—preserving jobs for lawful American workers. *INS v. Nat'l Ctr. for Immigrants' Rights, supra,* 502 U.S. at 194. That regulation, like the Arizona law, curbed *unlawful* employment by *unlawful* aliens—hardly a controversial measure.

Moreover, even where a state law does frustrate federal objectives, "the proper approach is to reconcile the operation of both statutory schemes" and pre-empt "only to the extent necessary to protect the achievement" of the federal goal, "rather than holding [the state scheme] completely ousted." *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange,* 373 U.S. 341, 361, 357 (1963); *De Canas v. Bica, supra,* 424 U.S. at 358 n. 5. Here, Arizona contributes to the attainment of federal goals through local restraint of unlawful employment solicitation.

Finally, this Court should exercise judicial restraint because "a ruling of unconstitutionality [would] frustrate the intent of the elected representatives of the people" of Arizona. *Crawford v. Marion County Election Bd., supra,* 553 U.S. at 203; *Washington State Grange v. Washington State Republican Party, supra,* 552

U.S. at 451; *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006), quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Even where a state statute cannot be upheld in its entirety, "courts should not nullify more of a state law than necessary so as to avoid frustrating the intent of the people and their duly elected representatives)." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-796 (1989), quoted in *Washington State Grange v. Washington State Republican Party*, *supra*, 552 U.S. at 456.

Much like *De Canas*, Arizona's law "mirror[s] precisely the federal policy, of protecting the domestic labor market, underlying the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 208 n. 5 (1982) (state may not deny public education to children who are illegal aliens—distinguishing *DeCanas*). It neither conflicts with nor obstructs the accomplishment of that purpose.

B. It Is Not Impossible To Comply With Both Federal And Arizona Law—In Fact, Compliance With Arizona Law Necessitates Compliance With Federal Law.

Where federal and state law conflicts, the result is straightforward—no matter how urgent the state interests:

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962).
>
> *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, *supra*, 458 U.S. at 153

But the conflict must be actual—not merely potential, speculative, or hypothetical. *Chicanos, supra,* 558 F.3d at 861, 863; citing *English v. Gen. Elec. Co., supra,* 496 U.S. at 89. The analysis must be approached with caution, because the "teaching of [the Supreme] Court's decisions. . .enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Id.* at 90, quoting *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446 (1960).

If the federal and state regulatory schemes both comprehensively regulate the subject matter, the overlap would be so great that they "must inherently either conflict or be duplicative." *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230. The Arizona law does neither. It complements federal law without duplication by regulating *unlawful* aliens who solicit work from employers who cannot legally hire them—under *federal* law.

Preemption is inescapable where it is impossible to comply with both federal and state law—even if Congress has not completely displaced state regulation—but not a foregone conclusion in the absence of such impossibility. *Chicanos, supra,* 558 F.3d at 861, 863; *English v. Gen. Elec. Co., supra,* 496 U.S. at 79; *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, supra,* 458 U.S. at 153 (federal regulations pre-empted conflicting state laws regulating federal savings and loans with respect to their "due-on-sale" practices); *Fla. Lime & Avocado Growers, Inc., supra,* 373 U.S. at 142-143 (*not* impossible to comply with both the Agricultural Adjustment

Act and California statute excluding certain out-of-state avocados); *Wyeth v. Levine*, *supra*, 129 S. Ct. at 1198 (*not* impossible to comply with both FDA and the stronger warning label required by state law—FDA oversight was not the exclusive means of ensuring drug safety and effectiveness).

In addition to its consistency with IRCA's overall objectives, Arizona relies on federal definitions. In *Chicanos*, this Circuit observed that the Legal Arizona Workers Act used the federal definition of "unauthorized alien" (8 U.S.C.S. §§ 1324a-1324b; Ariz. Rev. Stat. § 23-211(11)) and "the federal government's determination of the employee's lawful status." Ariz. Rev. Stat. § 23-212(H). *Chicanos*, *supra*, 558 F.3d at 861, 862. Similarly, *DeCanas* assumed that the California statute at issue would apply only "to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations." *De Canas v. Bica*, *supra*, 424 U.S. at 353 n. 2.

The same is true here. A.R.S. § 13-2928(G) defines an "unauthorized alien" as "an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 U. S. § 1324a(h)(3)." Arizona adds no new or conflicting definitions, imposing sanctions only on those who are *unlawfully* present in the U.S. and *unauthorized* to perform work under applicable *federal* definitions.

In a facial challenge with no factual context or background—as in this case—showing a conflict based on impossibility poses nearly insurmountable difficulties. *See Crawford v. Marion County Election Bd.*, *supra*, 553 U.S. 181 (facial challenge failed where state requirement for government-issued photo identification to verify voter identity was consistent with the National Voter Registration Act of 1993 and the Help America Vote Act of 2002). Arizona's law builds on federal definitions and achieves federal objectives. Compliance with both Arizona and federal law is not only possible—it is unavoidable.

CONCLUSION

Arizona's regulation of workers within its borders is a presumptively state matter that Congress has neither expressly nor impliedly preempted. Arizona regulates aspects of the employment relationship left untouched by IRCA. Federal law provides extensive sanctions for employers who hire illegal aliens—but carves out sufficient breathing room for states to monitor the conduct of individual employees.

Respectfully submitted,

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(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *And Attached to the Back of Each Copy of the Brief*

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September 2, 2010
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CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

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